Educating at the Crossroads: *Parents Involved*, No Child Left Behind and School Choice

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I. INTRODUCTION

In *Parents Involved in Community Schools v. Seattle School District No. 1* (*Parents Involved*)[1], the Supreme Court invalidated two voluntary integration plans. Democratically elected school boards in Seattle, Washington and Louisville, Kentucky conceived these plans with the goals of reaping the educational benefits that derive from racially diverse schools, ending racial isolation in the schools, and improving student achievement.[2] Some of the most important lingering questions after *Parents Involved* surround the new limitations placed on local school districts by the case and how school districts will achieve their goal of offering quality education to all children in the face of the Supreme Court's restrictions.

Parents Involved adds to the layers of regulations already impacting public school policymakers. Since the early 1990s, there has been the emergence of New Accountability reforms—states adopting statewide grade level standards, yearly testing, and accountability measures.[3] Then, in 2002, the United States Congress added to the already existing state accountability regime through the passage of No Child Left Behind (NCLB).[4] NCLB requires that each state have an accountability regime, with grade level standards, yearly assessments, and sanctions for schools that fail to make

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[1] 127 S. Ct. 2738 (2007).

[2] *See infra* Part II.

[3] *See* Aaron J. Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 873 (2006); GAIL L. SUNDERMAN ET AL., NO CHILD LEFT BEHIND MEETS SCHOOL REALITIES: LESSONS FROM THE FIELD xxix (2005) (observing that all fifty states had academic standards and accountability mechanisms prior to the passage of No Child Left Behind).

[4] 20 U.S.C. §§ 6301–7941 (Supp. V 2005).

adequate progress towards the goal of all students being proficient in reading and math.[5] NCLB's stated goals of improving the academic performance of all public school children and closing the achievement gap between white children and minority children have ratcheted up the rhetoric and focus on school performance.[6]

This Article will explore the post-*Parents Involved* options available to local school boards that continue to face the pressures of improving student educational outcomes and closing the achievement gap. Part II of this Article will explore the Supreme Court's lack of deference towards the Seattle and Louisville school districts' stated goals for adopting the voluntary integration plans. Part II will detail how the Roberts plurality opinion departed from precedent in the desegregation cases and higher education affirmative action cases by refusing to give deference to the policy choices of the local school officials. Part III will describe the various plans and approaches adopted by local school districts in the wake of *Parents Involved*, including Justice Kennedy's concurrence as a roadmap for school districts that want to continue to use race as a factor in student assignment, the return to neighborhood schools, and socioeconomic integration plans. Part III will examine why school districts may choose one of these options based on balancing the restrictions delineated by the Supreme Court in *Parents Involved* with the pressures to improve student achievement in poor, racially isolated schools. Part IV will highlight how the strictures on voluntary integration plans may increase the number of failing schools under NCLB, thus increasing demand for the NCLB student transfer option. Part IV will also examine the possibility that the dual pressures of *Parents Involved* and NCLB will fuel the school choice movement, especially the desire to open a greater number of charter schools throughout the United States.

II. THE SUPREME COURT V. THE SCHOOL DISTRICTS

In *Parents Involved*, the Supreme Court invalidated the voluntary integration plans adopted by the Seattle, Washington and Jefferson County, Kentucky school districts.[7] In a 5-4 decision, the Court held that the plans violated the Equal Protection Clause.[8] In addressing the first part of the

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[5] *Id.* § 6311(b)(2)(A) ("Each State plan shall demonstrate that the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress as defined under this paragraph.").

[6] *Id.* § 6301(3).

[7] *See Parents Involved*, 127 S. Ct. at 2746 (2007).

[8] *Id.* at 2760.

traditional Equal Protection analysis, whether the use of race serves a compelling government interest, Roberts, writing for a plurality, found that the school districts were motivated by the goal of "racial balanc[ing]."[9] Justice Kennedy wrote a separate concurrence on this issue and concluded that ending racial isolation and fostering a racially diverse student body would serve as compelling government interests for a school district that uses race as a factor in its student assignment plan.[10] The case was decided on the second prong of the Equal Protection analysis, with five Justices finding that the Seattle and Jefferson County plans were not narrowly tailored.[11] Justice Roberts writes for the majority that:

> Classifying and assigning schoolchildren according to a binary conception of race is an extreme approach in light of our precedents and our Nation's history of using race in public schools, and requires more than such an amorphous end to justify it.
>
> The districts have also failed to show that they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives . . ."[12]

This section focuses on the school districts' reasons for adopting the race-conscious student assignment plans—specifically the school districts' assertions that both academic and social benefits flow from racial diversity. Justice Roberts and three other members of the Court found that it was unnecessary to determine whether the claimed benefits of diversity were realized in the school districts.[13] In this section, I argue that the school districts' stated reasons for the plans should have been of central importance to the Court, and that the plurality's refusal to defer to the local school districts' policy judgment marks a decided turn away from precedent in previous Equal Protection education cases.

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[9] *Id.* at 2755. *See* Michael J. Kaufman, PICS *in Focus: A Majority of the Supreme Court Reaffirms the Constitutionality of Race-Conscious School Integration Strategies*, 35 HASTINGS CONST. L.Q. 1, 6 (2007) ("Significantly, not even Justice Roberts, in this section of his Plurality Opinion for just three other members of the Court, could find that [the school districts'] interests are not compelling. He writes that the 'debate' as to whether those interests are 'compelling' is 'not one [the Court] need resolve.'")(citation omitted).

[10] *Parents Involved*, 127 S. Ct. at 2791–92.

[11] *Id.* at 2760.

[12] *Id.*

[13] *See id.* at 2755.

A. *The Seattle Voluntary Integration Plan*

The two voluntary integration plans at issue in *Parents Involved* were very different in origin and scope. In Seattle, the school district used an "Open Choice" student assignment plan to assign students to one of Seattle's ten public high schools.[14] This assignment plan allowed students to submit their school preferences, and a student would be assigned on the basis of their choice as long as there was space available.[15] If the school was over-subscribed, the District took into account several tiebreakers. The first tiebreaker considered whether a sibling attended the same school, the second assessed the proximity of the school to the student's home, and the third was an "integration tiebreaker."[16] The integration tiebreaker was used in over-subscribed schools when the racial composition of the school deviated more than ten percent from the overall school district racial composition.[17] In the 2000–2001 school year, the "integration tiebreaker [] determined the assignments for approximately 300 of the 3,000 incoming ninth graders."[18] The school district argued that this modest use of the race-conscious tiebreaker meant that "the plan's primary goal of providing parental choice was largely met and the integration tiebreaker only minimally affected achievement of that goal."[19]

Why did the Seattle School Board adopt the use of the integration tiebreaker—a race-conscious student assignment plan? Unlike the Louisville school district that is the subject of the companion litigation, Seattle was never under a formal desegregation order.[20] Nonetheless, despite the lack of a formal court finding that Seattle engaged in de jure segregative practices, many administrative complaints and civil actions alleged that the school district was unlawfully segregated.[21] In fact, the Seattle School Board, in adopting its first mandatory school assignment plan (the "Seattle Plan"),

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[14] *See* Brief for Respondents Seattle Sch. Dist. at 6, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908).

[15] *See id.*

[16] *See id.* at 6. This is the tiebreaker system used in the 1999–2000 school year. The Seattle "Open Choice" student assignment plan began with elementary schools in the 1998–1999 school year and expanded to high schools in the 1999–2000 school year. *Id.* at 5–6.

[17] *Id.* at 6.

[18] *Id.* at 8–9.

[19] *Id.* at 9.

[20] *See Parents Involved*, 127 S. Ct. at 2802–06 (Breyer, J., dissenting) (Justice Breyer details the history of the struggle for the end of racial segregation in the Seattle schools.).

[21] Brief for Respondents Seattle Sch. Dist., *supra* note 14, at 3 (citations omitted).

stated that the plan was necessary to "ward off threatened litigation, . . . [and] to prevent the threatened loss of federal funds . . . ."[22]

Perhaps just as importantly, the Seattle Plan and later student assignment plans in Seattle were intended to combat residential segregation that had resulted in "more than 75% of the District's non-white students [living] in the southern half of the city" and "67% of white students [living] in the northern" part of the city.[23] This rigid pattern of housing segregation resulted from "[r]estrictive covenants and 'private codes' between landlords and realtors prohibiting sale or rental to minorities outside of certain neighborhoods . . . ."[24]

Combating the racial isolation in public schools that resulted from housing discrimination became a central focus of the Seattle School Board's mandatory student assignment plans beginning with the Seattle Plan of 1977.[25] The school board noted in adopting the plan that it was the Board's "perception that racial balance in the schools promotes the attainment of equal educational opportunity and is beneficial in the preparation of all students for democratic citizenship regardless of their race."[26]

In explaining its adoption of the "Open Choice" school plan at issue in the *Parents Involved* decision, the Seattle School Board again highlighted these themes.[27] The School Board's 1999 "Statement Reaffirming Diversity Rationale" noted the Board's "reasons for using the integration tiebreaker":

> First, the Board found value in racially diverse schools: it explained that a diverse student enrollment "fosters racial and cultural understanding" by "increas[ing] the likelihood that students will discuss racial or ethnic issues and be more likely to socialize with people of different races." Diversity "enhances the educational process" by "bring[ing] different viewpoints and experiences to [the] classroom" and "has inherent educational value from the standpoint of education's role in a democratic society." Diversity is therefore "a valuable resource for teaching students to become citizens in a multi-racial/multi-ethnic world."[28]

For almost thirty years, the Seattle School District considered and enacted race-conscious student assignment plans based on the judgment that

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[22] *Id.* at 3 n.6.

[23] *Id.* at 1.

[24] *Id.* at 1 n.2.

[25] *Id.* at 4 n.6.

[26] *Id.* at 3 n.6.

[27] Brief for Respondents Seattle Sch. Dist., *supra* note 14, at 8.

[28] *Id.* at 8 (citations omitted).

racial diversity has both social and educational benefits for its students.[29] The educational benefits cited over the course of that thirty-year process included an enhanced education process and the promotion of equal educational opportunity.[30] The social benefits included the promotion of cross-racial understanding and democratic citizenship values.[31]

B. *The Jefferson County Voluntary Integration Plan*

Unlike the Seattle school district, the Jefferson County schools were under a federal court desegregation order for approximately twenty-seven years.[32] In 2000, the desegregation order was lifted.[33] After the order was lifted, the Jefferson County Board of Education ("Jefferson County BOE") decided to adopt a comprehensive student assignment plan after concluding that the assignment of students to "neighborhood schools" would result in significant resegregation of the public schools.[34] The Jefferson County BOE attributed this likely resegregation to the historic pattern of residential segregation in the Louisville area.[35]

The comprehensive student assignment plan adopted by the Jefferson County BOE:

> include[d] automatic approval of majority-to-minority transfer requests; the grouping of elementary schools into clusters to facilitate integration; the adjustment of school attendance areas and programs as necessary to facilitate implementation of the Plan; programs and systems for orientation, training, administration, monitoring, and accountability; and broad racial guidelines. The Plan provides that each school (except preschools, kindergartens, alternative and special education schools, and self-contained

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[29] *See generally* Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 819–24 (2006) (discussing the mission of public education in American society and analyzing the Seattle and Louisville plans in this context).

[30] *See id.*; Brief for Respondents Seattle Sch. Dist., *supra* note 14, at 3 n.6.

[31] *See* Siegel, *supra* note 29, at 819–24; Brief for Respondents Seattle Sch. Dist., *supra* note 14, at 3 n.6.

[32] Brief for Respondents at 11, Meredith v. Jefferson County Bd. of Educ., 127 S. Ct. 575 (2006) (No. 05-915). The Jefferson County, Kentucky school district covers the Louisville metro area. *Id.*

[33] *Id.* at 13.

[34] *Id.* at 3.

[35] *Id.*

> special education units) shall have not less than 15% and not more than 50% black students.[36]

The Jefferson County BOE stated that its goals in creating and maintaining racially integrated schools were:

> To give all students the benefits of an education in a racially integrated school and to maintain community commitment to the entire school system precisely express the Board's own vision of *Brown's* promise. The benefits the [Jefferson County Public Schools] hope[] to achieve go to the heart of its educational mission: (1) a better academic education for all students; (2) better appreciation of our political and cultural heritage for all students; (3) more competitive and attractive public schools; and (4) broader community support for all JCPS schools.[37]

The reasons for the voluntary integration plan that were given by the Jefferson County school district differ in a few significant ways from the reasons proffered by the Seattle school district. Most significantly, Jefferson County claimed that racial diversity was central to the district's *academic* mission.[38] The school board cited the need to have better education for all students, but also to make their schools competitive.[39] This difference in claiming academic versus social benefits of diversity is an important distinction, especially in light of the social science evidence that was presented to the Court.[40] Furthermore, the core mission of America's public schools, especially in this age of New Accountability, is to provide a high-quality education and to give all students the opportunity to reach minimum proficiency in reading, math, and science.[41] Because academic goals are primary on the list of responsibilities for a school district, it is especially

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[36] *Id.* at 4–5 (internal citations omitted). *See also id.* at 3–9 (describing in detail the entire student assignment plan).

[37] *Id.* at 20–21 (quoting McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 836 (W.D. Ky 2004) *rev'd*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. N. 1, 127 S. Ct. 2738 (2007)).

[38] *See* Brief for Respondents, *supra* note 32, at 20–21.

[39] *Id.*

[40] *See* Siegel, *supra* note 29, at 825–26 (noting that there is "disagreement about whether racially diverse public schools advance academic achievement," but the civic and social benefits may not be readily amenable to rigorous empirical demonstration).

[41] *See, e.g.*, 20 U.S.C. § 6301 (Supp. V 2006) ("The purpose of [Title I] is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.").

important for any court to be attentive to aspects of school district policy that are aimed at improving academic achievement.

C. *The Supreme Court's Assessment of the School Districts' Policies*

As noted above, the majority's decision turns on its conclusion that the school districts' plans were not narrowly tailored to meet the stated objectives.[42] By sublimating the compelling interest portion of the equal protection analysis, the Roberts plurality does not directly engage with the school districts' stated policy goals. The plurality explains:

> The parties and their *amici* dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits. The debate is not one we need to resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.[43]

In one paragraph, the Roberts plurality sets aside the several decades long deliberative processes and considered judgment of the Seattle and Louisville school boards about the educational value and importance of racial diversity.[44]

Unlike Justice Roberts' opinion for the plurality that summarily dismisses the asserted connection between racial diversity and educational benefits, Justice Thomas's concurrence goes further and directly challenges the school districts' assertions that racially integrated schools have educational benefits. Justice Thomas argues:

> Scholars have differing opinions as to whether educational benefits arise from racial balancing. Some have concluded that black students receive genuine educational benefits. . . . Others have been more circumspect. . . . And some have concluded that there are no demonstrable educational benefits . . . .
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> . . . .

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[42] *Parents Involved*, 127 S. Ct. at 2760.

[43] *Id.* at 2755.

[44] *See* James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 150 (2007) [hereinafter Ryan, *Voluntary Integration*] ("Part of the disappointment [with the *Parents Involved* decision], if not anger, among some stems from methodology. Politically conservative judges have professed a commitment to democratic decisionmaking, federalism, and judicial restraint." (internal citations omitted)).

> Add to the inconclusive social science the fact of black achievement in "racially isolated" environments. . . .
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> The Seattle school board itself must believe that racial mixing is not necessary to black achievement. Seattle operates a K–8 "African-American Academy," which has a "nonwhite" enrollment of 99%. . . . This racially imbalanced environment has reportedly produced test scores "higher across all grade levels in reading, writing and math."[45]

Justice Thomas's concurrence exposes the fundamental tension between the Supreme Court's decision and the school districts. In order for the Court to determine if the school districts' stated reasons were compelling, the Court had to ask what the districts' policy goals were and whether the plans advanced these goals.[46] To make this determination, the Court would have been forced to confront the social science evidence on the academic and social benefits of diversity. After reviewing the social science, the next question for the Court would have been, if the social science differs on whether racial diversity has academic and social benefits, which institution—the courts or the local schools—is the proper institution to make policy choices based on conflicting social science evidence?

The social science in the case was somewhat conflicting. The American Educational Research Association and 553 Social Scientists as Amici Curiae in *Parents Involved* detailed the studies documenting the benefits of racially integrated student bodies in K–12 education.[47] In terms of the social benefits of racial diversity, the American Educational Research Association cited studies that indicate that racial diversity promotes cross-racial understanding among students and assists in reducing negative racial stereotypes and prejudice.[48] In terms of the academic benefits of racial diversity, the 553 social scientists noted that "research on academic achievement has concluded that there are modest positive effects on the achievement levels" of African-

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[45] *Parents Involved*, 127 S. Ct. at 2776–78 (internal citations omitted).

[46] Siegel, *supra* note 29, at 825 ("Even if school districts have a compelling interest in fulfilling their mission, and even if this mission, properly conceived, is more centrally concerned with teaching cross-racial unity than with instilling colorblindness, it does not necessarily follow that integrated schools actually advance this mission. It is therefore important to consider the constitutional significance of whether integrated schools do in fact produce civic, social, and educational benefits.")

[47] Brief of the American Educational Research Ass'n as Amicus Curiae in Support of Respondents at 6–9, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908); Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at 4 n.4, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908).

[48] Brief of the American Educational Research Ass'n as Amicus Curiae in Support of Respondents, *supra* note 47, at 6–9.

American and Latino students in desegregated schools.[49] The 553 social scientists also documented the studies that show an improvement in life opportunities and workforce preparation for minority students educated in a desegregated environment.[50]

There were two briefs that challenged the claim that racial diversity produces academic and social benefits.[51] These social scientists claimed that the research fails to indicate long-term benefits of desegregation on levels of educational attainment such as college attendance, wages, and occupational status.[52] One social scientist claimed that "there is no evidence that diversity in the K–12 classroom positively affects student achievement. . . . Even more disturbing than the lack of evidence demonstrating a benefit from forced racial balancing programs is the evidence showing that they are often *detrimental* to student performance."[53] The evidence presented in these briefs was criticized by the 553 social scientists as "rely[ing] on highly selective studies and outdated research to support their conclusions."[54]

The conflicting social science raised an important analytical and structural question for the Supreme Court—if the school districts made a good faith determination that there was enough evidence to support adopting a race-conscious student assignment policy, is it the proper role of the Court to find that, because the social science evidence is conflicting, the school district's policy choice does not meet the requirements of the Equal Protection Clause? Here, the plurality opinion answers that question by avoiding the social science altogether.

One view is that the Justices do not engage social science because their views on the benefits or burdens of racial diversity are well fixed and not likely to be changed.[55] As one scholar has noted:

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[49] Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *supra* note 47, at 7–8.

[50] *Id.* at 8–10.

[51] Brief of David J. Armor et al. as Amici Curiae in Support of Petitioners at 4–5, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908); Brief of Amici Curiae Murphy et al. in Support of Petitioners at 4, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908).

[52] Brief of David J. Armor et al. as Amici Curiae in Support of Petitioners, *supra* note 51, at 21.

[53] Brief of Amici Curiae Murphy et al. in Support of Petitioners, *supra* note 51, at 9–10 (citation omitted).

[54] Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *supra* note 47, at 4–5 n.4.

[55] James Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659, 1690 (2003).

> Although there is no way to measure this, I strongly suspect that most judges and Justices have quite firm views about [whether it is appropriate for the government to use race as a factor in decisionmaking]. Moreover, I suspect that most of them see this question as requiring a normative, moral judgment. . . . Social science research on these topics might, at some point in his or her thinking, influence a judge's views. It seems much more plausible to suppose, however, that judges are like most other educated nonspecialists, in that their world views are only weakly influenced by hard data. Once those views are formed, moreover, they may create something of a presumption about the mechanics of society, which could potentially be overcome . . . .[56]

In this view the social science becomes largely irrelevant. The Justices in the plurality made a moral judgment that the government should not use race as a factor in decision making, and therefore the school districts' deliberations and the social science become inconsequential to the plurality's determination. This moral judgment is clearly displayed in the closing line of the Roberts opinion when he asserts that "[t]he way to stop discriminat[ing] on the basis of race is to stop discriminating on the basis of race."[57]

Justice Thomas's concurrence also demonstrates the way that a Justice's moral judgment may become predominant. Justice Thomas argues that the Seattle school district's finding that racially imbalanced schools may harm student achievement must be false because the school district has an African-American academy, and that academy is a high-performing school.[58] First, accepting Justice Thomas's premise would mean that allowing an experimental school to exist within the school district in itself contradicts broader school district policy on what is generally the most effective environment for students to learn.

Furthermore, Justice Thomas's assertions about the academic success of the African-American Academy are incorrect. Justice Thomas states that the school has produced higher scores "across all grade levels" in reading, writing, and math.[59] The Academy has the lowest seventh-grade math scores in the school district, is the only Seattle school that has failed to make adequate yearly progress for four consecutive years, and is in danger of restructuring under No Child Left Behind.[60] In 2007, only 40% of the eighth

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[56] *Id.*

[57] *Parents Involved*, 127 S. Ct. at 2768.

[58] *Id.* at 2777–78 (Thomas, J. concurring).

[59] *Id.* at 2778.

[60] *See* Linda Shaw, *More state schools miss targets*, SEATTLE TIMES, Aug. 25, 2007, at A1, *available at* 2007 WLNR 16640341; Emily Heffter, *African American Academy: Black Community's Dream Gets One More Try*, SEATTLE TIMES, Aug. 27, 2007, at A1, *available at* 2007 WLNR 16813463. A school district is designated as in need of

grade students were proficient in reading, 12% were proficient in math, and 8% proficient in science.[61] These poor results are despite the school's clear mission of providing an excellent education for African-American students with a culturally sensitive curriculum and strong community support.[62]

The Roberts plurality opinion and Justice Thomas's concurrence demonstrate the Court's willingness to set aside the policy choices of the school districts. The Justices are willing to rely on their own moral judgment over the views of the democratically elected school boards and over social science.[63]

D. *The History of Deference to Educational Institutions*

The next section explores how the Roberts plurality's failure to favor local control and show some deference to the local school district is a detour from Supreme Court precedent in both the higher education affirmative action cases and the K–12 desegregation cases.[64] My analysis in this section is premised on the fact that the school districts in this case acted without a racially invidious intention. Justice Roberts equates the school districts in this case with school districts in the *Brown* era that told students where to go to school on the basis of their skin color.[65] The present school districts considered race in order to produce educational benefits for all students in the district and without a belief in the racial superiority of one race, while the segregationist school districts at issue in *Brown* considered a student's race in order to reinforce racial hierarchy. In the Ninth Circuit opinion, Judge Kozinski makes a similar argument in concurrence stating "[t]he plan does not segregate the races; to the contrary, it seeks to promote integration. There is no attempt to give members of particular races political power based on skin color. There is no competition between the races, and no race is given a

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'restructuring' after it fails to meet adequate yearly progress for four consecutive years. 20 U.S.C. § 6316(b)(8)(B).

[61] Washington State Report Card, http://reportcard.ospi.k12.wa.us/SideBySide.aspx?schoolId=1&OrgTypeId=1&reportLevel=State&orgLinkId= (last visited Nov. 24, 2008).

[62] *See* Heffter, *supra* note 60, at A1.

[63] *See* Siegel, *supra* note 29, at 824 (arguing that even if there is disagreement on whether there are benefits to racial diversity, federalism principles suggest that school districts should be given leeway to make this decision).

[64] *See Parents Involved*, 127 S. Ct. at 2811–12 (Breyer, J., dissenting) (examining desegregation cases in which the Supreme Court has emphasized the importance of local control).

[65] *Id.* at 2768 (plurality opinion).

preference over another."[66] Justice Stevens also points out the gulf between the motives of the school districts in this case and the de jure segregation era. "The Chief Justice fails to note that it was only black schoolchildren who were [ordered to attend segregated schools]; indeed, the history books do not tell stories of white children struggling to attend black schools."[67]

In the 2003 Michigan Law School affirmative action case, *Grutter v. Bollinger,*[68] the majority recognized the importance of context and deference in making determinations under the Equal Protection Clause.[69] In *Grutter*, the Supreme Court specifically gave deference to the University of Michigan Law School's reason for considering race in its admissions policy stating: "The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."[70]

Also noteworthy is the similarity in the reasons proffered by the University of Michigan Law School and the two school districts for adopting race-conscious plans. Michigan's law school explained that one of the reasons for its race-conscious admissions policy was to promote cross-racial understanding and to better enable students to understand people of different races.[71] The Seattle School Board cited similar goals, including fostering racial and cultural understanding.[72] The Jefferson County BOE put on trial evidence targeted at establishing that its underlying policy reasons were similar to the ones expressed in *Grutter*, including a survey of recent graduates from Jefferson County schools who affirmed the democratic values taught through an integrated learning environment.[73]

With these noted similarities, why does the plurality opinion draw a distinction in the treatment accorded the University of Michigan Law School in *Grutter* and the school districts in *Parents Involved*? The plurality attempts to distinguish *Grutter* as being limited to the higher education context, stating "[i]n upholding the admissions plan in *Grutter,* though, this Court relied upon considerations unique to institutions of higher education, noting that in light of 'the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our

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[66] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1194 (9th Cir. 2005) (Kozinski, J., concurring); *see also* Goodwin Liu, Seattle *and* Louisville, 95 CAL. L. REV. 277, 280 (2007).

[67] *Parents Involved*, 127 S. Ct. at 2798.

[68] 539 U.S. 306 (2003).

[69] *Id.* at 327–28.

[70] *Id.* at 328.

[71] *Id.* at 330.

[72] *See* Brief for Respondents, *supra* note 14, at 8.

[73] *See* Brief for Respondents, *supra* note 32, at 25–26.

constitutional tradition.'"[74] This quote from *Grutter* was an explanation of the special First Amendment considerations in the higher education context, but the opinion does not limit the notion of deference to the educational institution to the higher education context.[75]

Further proof that Supreme Court deference to school policymakers has not been limited to the higher education context is that *Parents Involved* represents a marked detour from local control of schools as an important theme championed by the Supreme Court in previous K–12 desegregation cases.[76] In the desegregation cases, the Court emphasized the importance of respecting the educational judgment of school districts, and the Court was willing to provide this deference even when the school districts had already been found to be constitutionally bad actors and were seeking to have desegregation orders lifted. The Court also trumpeted the importance of local control of public schools and the need for federal courts to allow local educational policymakers to take the lead in making important education policy decisions.

The Supreme Court's endorsement of deference to the educational judgment of the local school board is found in desegregation cases going back to the 1970s.[77] In *North Carolina State Board of Education v. Swann*,[78] the Supreme Court endorsed the idea of courts giving deference to local school districts to determine whether to adopt plans that would increase racial integration stating: "[S]chool authorities have wide discretion in formulating school policy . . . . [A]s a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements."[79] In *Milliken v. Bradley*,[80] the Supreme Court noted that "local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs,

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[74] *Parents Involved*, 127 S. Ct. at 2754 (quoting Grutter v. Bollinger, 539 U.S. 306, 329 (2003)).

[75] *Id.* at 2817–18 (Breyer, J. dissenting).

[76] *See* Ryan, *Voluntary Integration*, *supra* note 44, at 150.

[77] *See id.* ("In the context of school desegregation, the conservative Justices have also strongly endorsed the notion of local control, beginning in *Milliken*, and continuing through *Dowell*, *Freeman*, and *Jenkins*. Indeed, the Court relied on local control to justify limiting the scope of desegregation in *Milliken* and its duration in *Dowell*, *Freeman*, and *Jenkins*.")

[78] 402 U.S. 43 (1971).

[79] *Id.* at 45. The Jefferson County BOE, the Seattle School District, and many of the amici argue deference as one of the major reasons for affirming the voluntary integration plans in this case.

[80] 418 U.S. 717 (1974).

and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'"[81]

Desegregation cases of the 1990s created an easier path for school districts to attain unitary status. In those cases a majority of the Supreme Court emphasized the importance of returning schools to local control. In *Board of Education of Oklahoma City Public Schools v. Dowell*,[82] Justice Rehnquist reaffirms the importance of local control that *Milliken* states: "Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs."[83] In *Freeman v. Pitts*,[84] the Court noted that "[L]ocal autonomy of school districts is a vital national tradition."[85] This emphasis on local control has been especially important to conservative Justices like the ones in the plurality in *Parents Involved*, thus making their disregard for local control even more troubling in this case.[86]

The student assignment plans in *Parents Involved* were tailor-made for the application of the local control principles set forth in these desegregation cases. The purpose of local control is to allow citizens to participate in decision making and to ensure that the local authorities have the necessary authority to control schools, a responsibility that has traditionally been left to state and local government. The school districts in *Parents Involved* detailed the aspects of their deliberation process that implicate these democratic and federalism concerns. The Jefferson County BOE argued that its policy decisions were particularly entitled to deference due to its status as a democratically elected body and the fact that its policy choices were made after significant community input.[87] The Jefferson County BOE noted that one of the flaws in the desegregation decree was that it was court imposed, but for the post-desegregation decree student assignment plan, "[e]ach revision of the student assignment process was preceded by extensive community outreach and input. Each revision was influenced by the needs

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[81] *Id.* at 742 (citation omitted).

[82] 498 U.S. 237 (1991).

[83] *Id.* at 248 (citing Milliken v. Bradley, 418 U.S. 717, 742 (1974)).

[84] 503 U.S. 467 (1992).

[85] *Id.* at 490 (quoting Dayton Bd. Of Educ. v. Brinkman, 433 U.S. 406, 410 (1977)).

[86] *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 131 (1995) ("When district courts seize complete control over the schools, they strip state and local governments of one of their most important governmental responsibilities, and thus deny their existence as independent governmental entities." (Thomas, J., concurring)).

[87] *See generally* Brief for Respondents, *supra* note 32, at 21–23.

and desires conveyed to the Board by parents, educators, interested groups of stakeholders, and the public at large."[88]

> The Board, responding to its constituents in a manner that exemplifies effective democratic decision-making, has skillfully converted a blunt and controversial desegregation decree into a nuanced and educationally sound student assignment plan that is broadly accepted by the community. It is an accomplishment of which the people of Jefferson County are rightly proud.[89]

The Jefferson County BOE also noted the particular need for deference to the local policy makers due to the traditional role of local government and states in governance of the public schools.

> This deference that this Court gives to local school boards is grounded in the vital civic role of their schools. This Court recognized the fundamental importance of those schools to the nation in decisions such as *Brown*, *Plyler* and *Ambach*. . . . Yet, "a State need not justify by compelling necessity every variation in the manner in which education is provided to its population."[90]

It is clear that the Roberts plurality departed from the well-established principles of local control and deference to school districts. The next section will examine the options available to school districts now operating in a post-*Parents Involved* framework.

III. STUDENT ASSIGNMENT PLANS IN THE WAKE OF *PARENTS INVOLVED*

What policies will school districts use to assign students to schools in the wake of *Parents Involved*, and are there likely to be more racially isolated schools as a result of the Supreme Court's opinion? For many school districts, *Parents Involved* will not have a significant impact on student assignment policies. James Ryan argues that the decision will not have a broad practical impact because racial integration is not on the radar for many school districts.[91] Also, many school districts were already prevented from using student assignment plans like the ones in Seattle and Louisville, because the large majority of the students in the school district are one race.[92]

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[88] *Id.* at 22.

[89] *Id.* at 23–24.

[90] *Id.* at 31 (quoting Plyler v. Doe, 457 U.S. 202, 223 (1982)).

[91] Ryan, *Voluntary Integration*, *supra* note 44, at 132.

[92] *Id.* at 132–33.

A. *Justice Kennedy's Roadmap*

For those school districts that were operating voluntary integration plans, Justice Kennedy's concurrence will become a vital roadmap if they seek to continue these policies. Justice Kennedy's concurrence departs from the Roberts plurality opinion on the issue of whether schools may permissibly consider race in composing the student body of their schools.[93] First, Justice Kennedy notes that school districts may articulate a compelling government interest for using race as a factor in assigning students to schools. "To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken."[94]

Justice Kennedy describes what he believes would be narrowly tailored uses of race by a school district that wanted to combat racial isolation. Because Kennedy's vote was the decisive one for the majority, many believe that his concurrence will become a blueprint for school districts that seek to limit racial isolation within the confines of the Equal Protection Clause.[95]

> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and teachers in a targeted fashion; and tracking enrollments, performance, and other statistics by race.[96]

In May 2008, the Jefferson County, Kentucky school district adopted a new student assignment plan that considers race, but with modifications that

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[93] *Id.* ("The opinion for the Court is relatively brief (a mere 20 pages) and fairly straightforward. The Court applied strict scrutiny and held that the plans at issue were not narrowly tailored because neither school district had shown that classifying individual students by race was needed to achieve integrated schools . . . . Technically, Justice Kennedy's entire opinion is dictum. The Court's opinion, which Justice Kennedy joined, was sufficient to dispose of these cases.").

[94] *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring).

[95] Ryan, *Voluntary Integration*, *supra* note 44, at 135 ("This is why Justice Kennedy's concurring opinion is potentially so important: it answers some of the questions left open by the Court's opinion. Justice Kennedy would recognize a compelling interest in achieving 'a diverse student body, one aspect of which is its racial composition.' He would also recognize a potentially inconsistent compelling interest in 'avoiding racial isolation.'") (footnotes omitted).

[96] *Parents Involved*, 127 S. Ct. at 2792.

appear to be fitted to the suggestions in Justice Kennedy's concurrence.[97] The Jefferson County schools will now assign students to schools based on geographic areas.[98] The geographic boundaries in the school system will be determined by using a variety of demographic factors including household income, parent education, and race.[99] The school district decided to continue to consider race as one factor in the student assignment process because of "overwhelming interest and support in maintaining diversity" in the schools.[100]

B. *Neighborhood Schools*

Some school districts may view *Parents Involved* as a reason to return to neighborhood schools as the primary method for student assignment. In the same summer that *Parents Involved* was decided, a controversy erupted in Tuscaloosa, Alabama over a school board plan to return to neighborhood schools.[101] White parents in the school district complained of school overcrowding.[102] The predominately white school board and superintendent adopted a rezoning plan that would have students reassigned to "community schools."[103] The plan meant that most of the reassigned students would be black students and that they would be required to move to low-performing, racially isolated schools.[104]

The return to neighborhood schools has been a concern in other school districts, due to the potential for resegregation. In San Francisco, after ending a consent decree that allowed a race conscious student assignment plan, there has been significant resegregation of its public schools under a race-neutral student assignment plan.[105] "During the 2001–02 school year, 30 schools were severely resegregated at one or more grade levels—meaning that 60%

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[97] News Release, Jefferson County Pub. Sch. (May 29, 2008) (on file with author), available at http://www.jefferson.k12.ky.us/AboutUs/StudentAssigPlan.html.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] Sam Dillon, *Alabama School Rezoning Plan Brings Out Cry of Resegregation*, N.Y. TIMES, Sept. 17, 2007, at A1.

[102] *Id.*

[103] *Id.* at A1, A16.

[104] *Id.* at A1.

[105] Brief of the Lawyers' Committee for Civil Rights of the San Francisco Bay Area as Amicus Curiae Supporting Respondents at 13–14, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908).

or more of the students in those grades were of one race/ethnicity."[106] This number increased to forty-three schools by 2004–2005.[107]

Neighborhood schools are linked to increased racial isolation because of the persistence of residential segregation with "one-third of all African-Americans in the United States liv[ing] under conditions of intense racial segregation."[108] Furthermore, the Lewis Munford Center's "Index of Dissimilarity," derived from census data, shows "thirty-three of the top fifty metropolitan areas are highly segregated. The remaining seventeen are moderately segregated. None is within the range that social scientists would consider integrated."[109] Therefore, in many cities, the use of a student assignment plan that places students in the schools closest to their residences will replicate this pattern of racial isolation.

There is significant concern about neighborhood schools leading to increased racial isolation, because racial isolation has been shown to have a negative impact on the academic performance of black and Latino students.

> While there are examples of academically successful schools with high concentrations of nonwhite students, more often than not, segregated minority schools offer profoundly unequal educational opportunities. This inequality is manifested in many ways, including fewer qualified, experienced teachers, greater instability caused by rapid turnover of faculty, fewer educational resources, and limited exposure to peers who can positively influence academic learning. No doubt as a result of these disparities, measures of educational outcomes, such as scores on standardized achievement tests and high school graduation rates, are lower in schools with high percentages of nonwhite students.[110]

In the San Francisco schools, the "[a]cademic achievement data indicate a close relationship between resegregation and the disparity in academic achievement between black and Latino students in comparison with white

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[106] *Id.* at 14.

[107] *Id.*

[108] Leland Ware, *The Demographics of Desegregation: Residential Segregation Remains High 40 Years After The Civil Rights Act of 1964*, 49 ST. LOUIS U. L.J. 1155, 1155 (2005) (quoting DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 77 (1993)).

[109] *Id.* at 1666 (emphasis omitted).

[110] Brief for 553 Social Scientists as Amici Curiae in Support of Respondents at 3, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908, 05-915).

and Chinese-American students."[111] In the city "'[t]he overwhelming majority' of schools that ha[ve] succeeded in closing the achievement gap . . . were ones that had maintained 'ethnically and racially-diverse student bodies.'"[112]

Other urban public school districts have also seen the effect of racially isolated schools on the outcomes of poor students; the reality is not limited to the San Francisco area schools. For example, the schools in New Orleans were racially isolated before Hurricane Katrina. The entire New Orleans public school population was 93% African-American and 4% white.[113] By fourth grade, only 41% of New Orleans' public school students could meet basic math requirements and 44% in English.[114] On the high school exit exam, there was a 39% passage rate in math and 32% in English.[115]

Therefore, if one result of *Parents Involved* is more neighborhood schools and increased racial isolation, we will very likely see schools with high concentrations of minority students struggle to meet academic standards. The consequences of these struggles will be explored in detail in Part IV.

C. *Socioeconomic Integration*

The struggles for racially isolated minority schools may also be attributed to the existence of high poverty rates in these schools. The Civil Rights Project at the University of California, Los Angeles (formerly at Harvard University) estimates that "88% of the intensely segregated minority schools (or schools with less than ten percent white) had concentrated poverty, with more than half of all students getting free lunches."[116]

Poverty impacts student achievement in significant ways. These schools are "twenty-two times less likely than middle class schools to be consistently high performing."[117] Children in poverty also suffer health problems that

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[111] Brief for Lawyers' Committee for Civil Rights of the San Francisco Bay Area, *supra* note 105, at 14–15 (quoting San Francisco NAACP v. San Francisco Unified Sch. Dist., 413 F. Supp. 2d 1051, 1059 (N.D. Cal. 2005)).

[112] *Id.* at 15.

[113] Danielle Holley-Walker, *The Accountability Cycle: The Recovery School District Act and New Orleans' Charter Schools*, 40 CONN. L. REV. 125, 134 (2007).

[114] *Id.* at 135.

[115] *Id.*

[116] GARY ORFIELD & CHUNGMEI LEE, *BROWN* AT 50: KING'S DREAM OR *PLESSY'S* NIGHTMARE? 21 (2004), *available at* http://civilrightsproject.ucla.edu/research/reseg04/brown50.pdf.

[117] Richard D. Kahlenberg, *Socioeconomic School Integration*, 85 N.C. L. REV. 1545, 1548 (2007).

may impact learning, such as undiagnosed vision problems, other untreated medical conditions, and poor nutrition.[118]

> Lack of food, lack of adequate housing, and residential mobility also affect children's performance in school. In 2002, not less than "2% of children from low-income families seem to have experienced real hunger at some time in the year." Inadequate housing often deprives children of quiet study space and contributes to frequent moves and, therefore, a high mobility rate for lower-class children.[119]

This troubling link between poverty and poor student outcomes may also guide future student assignment plans in the post-*Parents Involved* landscape. School districts may choose to use socioeconomic status as a consideration in student assignment in order to combat the effects of concentrated poverty. Approximately forty school districts that educate 2.5 million students are using "socioeconomic status as a factor in student assignment."[120] The most often cited example of a socioeconomic integration plan is the Wake County, North Carolina school district that shifted from a racial integration plan to a socioeconomic plan in 2000.[121] In Wake County, the district considers both "[d]iversity in student achievement (no more than 25% of the students assigned to any school . . . performing below grade level on state tests) . . . [and] [d]iversity in socioeconomic status (no more than 40% of the students . . . will be eligible for free or reduced price lunch)."[122] More school districts may choose to follow Wake County's lead in the wake of *Parents Involved*. First, socioeconomic integration plans have not faced any successful Equal Protection challenges, likely due to the Supreme Court's determination that wealth is not a suspect classification.[123] Also, the early results of the program are showing improved student achievement for all students and a narrowing of the achievement gap among students of different socioeconomic groups.[124]

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[118] Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1472–1473 (2007).

[119] *Id.* at 1473 (citation omitted).

[120] Kahlenberg, *supra* note 117, at 1551.

[121] *See id.* at 1552.

[122] John Charles Boger, *Education's "Perfect Storm"? Racial Resegregation, High Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1397 (2003) (quoting Wake County Pub. Sch. Sys., R&P 6200: Student Assignment, at D–E, http://www.wcpss.net/policy-files/series/policies/6200-bp.html (last visited Nov. 22, 2002) (on file with the North Carolina Law Review)).

[123] *Id.* at 1398–1399.

[124] Kahlenberg, *supra* note 117, at 1552.

IV. EXPLORING THE DUAL PRESSURES OF *PARENTS INVOLVED* AND NO CHILD LEFT BEHIND

School districts are now at a crossroads in the area of student assignment and other policies that may affect student educational outcomes.[125] Many of the choices made by school district officials about the type of student assignment plan to adopt will not just be influenced by the Equal Protection concerns of *Parents Involved*, but also the pressure to produce positive academic outcomes on standardized tests. New Accountability reforms, such as NCLB, place tremendous pressure on school districts, individual schools, school administrators, and teachers to improve student performance. This section will explore how the restrictions of *Parents Involved* will interact with the significant demands of the NCLB.

A. *NCLB Consequences for Racially Isolated Schools*

NCLB requires states to adopt sanctions for schools that do not meet certain yearly benchmarks (adequate yearly progress or AYP) on state-administered standardized tests.[126] NCLB mandates that schools that fail to attain AYP towards the goal of proficiency be designated as in need of "improvement, corrective action, or restructuring."[127] Under NCLB, a school that fails to make AYP for two consecutive years is designated as in need of "improvement."[128] The sanctions for schools in need of "improvement" include informing parents of the school's status, offering students supplemental education services, and allowing students to transfer to another

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[125] A few years ago, Professor John Charles Boger described "Education's Perfect Storm." Professor Boger argued that schools all over the South were facing the prospect of educational policies colliding to create "strongly adverse, unanticipated consequences." Boger, *supra* note 123, at 1375. He predicted that the end of desegregation orders, which has lead to rapid resegregation of the public schools, along with high-stakes testing required under No Child Left Behind, and the continuing funding disparities for poor schools, will "entrench[ ] broad patterns of grade retention, student demoralization, and teacher flight." *Id.* at 1376.

[126] 20 U.S.C. § 6311(b)(2)(A) (Supp. V 2005) ("Each State plan shall demonstrate that the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress as defined under this paragraph.").

[127] 20 U.S.C. § 6316(b)(1)(D) (Supp. V 2005). The terminology for the sanction levels differs state-by-state. *See, e.g.*, LA. REV. STAT. ANN. § 17:10.5(A)(1) (West Supp. 2008) (explaining Louisiana's terminology for school sanctions as "academically unacceptable").

[128] 20 U.S.C. § 6316(b)(1)(A) (Supp. V 2005).

school.[129] After four consecutive years of failing to meet AYP, a school is designated as in need of "corrective action,"[130] and after five consecutive years, the school is deemed to be in need of "restructuring."[131] The "restructuring" designation comes with the most severe penalty options, including state takeover of the school from the local school district, school closure, and the reopening of the school as a charter school.[132]

These accountability measures are already having an impact on many schools in the United States, especially in metropolitan areas with high percentages of racially isolated minority schools. A disproportionate number of the schools facing NCLB sanctions are "segregated minority schools":

> The studies show that heavily minority and low income schools are far more likely to be classified as failing under the act and that schools with concentrations of language minority students are particularly unlikely to make the required test score gains in English-language tests. The law requires segregated minority schools to make far larger yearly gains than affluent suburban schools and, since that often does not happen in spite of the pressure, many of these schools have already been required to inform the families that the school is failing. These schools are threatened with the possibility of radical changes included in the act, including dissolution of the school.[133]

The link between racially isolated minority schools and NCLB sanctions is already evident in states such as California. California has a large number of racially isolated schools. In California, "the typical Latino student attends a school where 81% of the students are not white, and the typical African American student attends a 78% non-white school."[134] Only 39% of black fourth graders and 38% of Latino fourth graders in the state are proficient in reading.[135] These poor testing scores are partially responsible for California's

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[129] 20 U.S.C. § 6316(b)(5)–(6) (Supp. V 2005).

[130] 20 U.S.C. § 6316(b)(7)(C) (Supp. V 2005).

[131] 20 U.S.C. § 6316(b)(8)(A) (Supp. V 2005).

[132] 20 U.S.C. § 6316(b)(8)(B) (Supp. V 2005).

[133] Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality* 41 (2005), http://www.civilrightsproject.ucla.edu/research/deseg/Why_Segreg_Matters.pdf.

[134] Jeannie Oakes et al., *Separate and Unequal 50 Years After Brown: California's Racial "Opportunity Gap"* 1 (2004), http://justschools.gseis.ucla.edu/research/publications/brownsu2.pdf (data taken from 2003–2004).

[135] U.S. DEP'T OF EDUC., MAPPING CALIFORNIA'S EDUCATIONAL PROGRESS 2 (2008), http://www.ed.gov/nclb/accountability/results/progress/california.pdf.

having 2,204 schools labeled as "in need of improvement" and 1,013 schools persistently failing and marked for "restructuring."[136]

Thus, the tension between *Parents Involved* and NCLB sanctions becomes clear. Some school districts use voluntary integration plans to combat racial isolation, and the Supreme Court's decision may create a chilling effect for school districts afraid to face litigating race conscious plans. If that occurs, there will likely be an increase in race-neutral assignment plans, such as neighborhood schools. Due to the persistence of residential segregation, especially in large urban areas, neighborhood schools will mean increased racial isolation. If there is corresponding low performance on test scores schools in these racially isolated minority schools, we will see more schools facing NCLB sanctions.

B. *The NCLB Transfer Provision*

One of the most high-profile aspects of NCLB's accountability provisions is the statute's student transfer provision.[137] NCLB requires that when a school is identified as in need of improvement, the school district "shall . . . provide all students enrolled in the school with the option to transfer to another public school served by the [district] . . . that has not been identified for school improvement . . . unless such an option is prohibited by State law."[138] Of the 98,905 public schools in the United States, 10,676 (9.26%) have been designated as in need of improvement and thus eligible for students to transfer.[139]

The NCLB transfer provision will likely become an even more spotlighted provision of the law in the wake of *Parents Involved.* In school districts like Tuscaloosa, Alabama, where there has been a return to neighborhood schools, civil rights advocates are planning to use the NCLB transfer provision to claim that it is unlawful to transfer minority students to lower performing schools.[140] In Greensboro, North Carolina, a significant

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[136] *Id.* at 1.

[137] *See generally* James E. Ryan, *The Perverse Incentives of The No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 966–968 (2004) (explaining why the transfer option will likely be ineffective); Charles R. Lawrence III, *Who Is the Child Left Behind?: The Racial Meaning of the New School Reform*, 39 SUFFOLK U. L. REV. 699, 708 (2006) (noting that the transfer provision was painted as a saving grace for parents of minority low income students "trapped in failing schools," but the reality is that the transfer option may only benefit a small number of students).

[138] 20 U.S.C. § 6316(b)(1)(E)(i) (Supp. V 2005).

[139] U.S. DEP'T OF EDUC., MAPPING AMERICA'S EDUCATIONAL PROGRESS 1 (2008), http://www.ed.gov/nclb/accountability/results/progress/nation.pdf.

[140] Dillon, *supra* note 101, at A1.

number of black students have transferred out of low-performing schools with high minority populations, to majority white schools with higher test scores.[141] Thus, the NCLB student transfer provision may be a tool for advocates of racially integrated schools.

Will the student transfer provision provide relief for minority students in underperforming schools? Although many minority students are eligible for transfer, only 2.2% of students in eligible schools have requested transfer.[142] The NCLB student transfer option has been hindered by several factors. First, the transfer option is typically only available within the school district where the student is already attending.[143] This limits the number of schools available for transfer. Second, in some school districts, the large majority or all of the schools in the district have failed to meet adequate yearly progress; consequently, a parent will not have a better school in the district to seek out as a possible transfer option.[144] NCLB provides that if an entire school district fails to meet AYP, the state may allow students to transfer to another district, but the state must provide transportation costs and the new school district must be willing to receive the transfers.[145]

Interdistrict transfers are allowed on a voluntary basis. Ironically, however, the pressures of NCLB make these transfers unlikely. For example, a school district meeting adequate yearly progress would have no incentive to take students who are coming from failing schools for fear that these students would underperform on standardized tests.[146] As one expert describes, "[i]magine that one of those suburban schools finds itself entirely failing to achieve AYP in part or entirely because the transfer students do not meet their benchmark. To the extent suburban school participation was voluntary, there undoubtedly will be pressure within the district to bow out of the program."[147]

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[141] *Id.* at A16.

[142] U.S. DEP'T OF EDUC., *supra* note 139, at 2. The United States Department of Education states that 5,450,081 students are eligible for student transfer with only 119,988 actually transferring as allowed under NCLB.

[143] William L. Taylor, *Title I as an Instrument for Achieving Desegregation and Equal Educational Opportunity*, 81 N.C. L. REV. 1751, 1757 (2003).

[144] *See id.*

[145] *Id.*

[146] *See* Ryan, *supra* note 137, at 962–963.

[147] Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261, at n.108 (citing Ryan, *supra* note 138, at 963). The notion of minority students in low performing schools transferring to higher performing schools with mostly white populations also raises some troubling questions about the way methods for seeking more racial integration may have the unintentional effect of reinforcing stereotypes of black inferiority. *See* Kevin Brown, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality*

One of the ironies of the post-*Parents Involved* NCLB student transfer provision is that if the transfer is increasingly used by minority students in urban school districts to transfer to suburban school districts, the Supreme Court's decision will have returned the school districts to a scenario the Supreme Court already attempted to deconstruct in *Milliken v. Bradley*.[148] In *Milliken*, the Supreme Court struck down a federal district court-created desegregation plan that utilized a multidistrict remedy to end de jure segregation.[149] *Milliken* precluded an interdistrict remedy for segregation unless the plaintiff could demonstrate that there was an interdistrict constitutional violation.[150] This decision limited many of the most effective desegregation efforts available for school districts.[151] Now the NCLB transfer provision spurred on by *Parents Involved*, although quite different from the court-imposed desegregation plan in *Milliken*, may revive this debate about interdistrict solutions to the problem of racial isolation.

C. Parents Involved, *NCLB, and the Growth of Charter Schools*

Another possible outcome of the dual pressures of *Parents Involved* and NCLB is the further popularization of school choice reforms, especially charter schools. "Charter schools, by definition, are schools of choice that operate with more autonomy (and fewer regulations) under a charter or contract issued by a public entity, such as a local school board, public university, or state board of education."[152] Charter schools are an important element of the NCLB accountability regime, in that the law allows students attending schools in need of improvement to transfer to a charter school.[153] Also, at least twelve states have accountability statutes that would allow a failing school to restructure by being converted into a charter school.[154]

Pre-*Parents Involved*, NCLB and state accountability measures had already resulted in an increase in the number of charter schools that were

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Education Lawsuits, 42 EMORY L.J. 791, 819 (1993) (explaining that the Supreme Court's analytical framework in the desegregation cases forces proponents of integration "to couch their position in notions of" African-American educational deficiencies).

[148] Milliken v. Bradley, 418 U.S. 717, 742–743 (1974).

[149] Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1607 (2003).

[150] *Id.*

[151] *See id.*

[152] KATRINA E. BULKLEY & PRISCILLA WOHLSTETTER, *Introduction* to TAKING ACCOUNT OF CHARTER SCHOOLS 1, 1 (Katrina E. Bulkley & Priscilla Wohlstetter eds., 2004).

[153] 20 U.S.C. § 6316(b)(1)(E) (Supp. V 2005).

[154] Holley-Walker, *supra* note 113, at 143.

being created to serve as replacements for failed traditional public schools. For example, the Louisiana legislature passed the Recovery School District Act ("RSDA") in 2003 in order to comply with No Child Left Behind.[155] Under the RSDA, a school failing to meet AYP for four years will be operated under the auspices of the state Recovery School District ("RSD").[156] Prior to Hurricane Katrina, over 60 of the 116 public schools in New Orleans were taken over by the RSD.[157] After Hurricane Katrina, the Louisiana legislature expanded the jurisdiction of the RSD, leading to 107 of the 116 New Orleans public schools being operated by the state.[158] In the new RSD-helmed New Orleans public school system, nearly 60% of the fifty-four reopened public schools are charter schools.[159] These charter schools are a consequence of the aggressive RSDA accountability measures.

In 2007, the Georgia legislature passed a statute that allows a local school board to get approval for an all-charter-school system.[160] Once the state board of education grants the local school board's petition, all of the schools in that school district must be charter schools.[161] The Georgia Board of Education has approved four charter school systems in the state in the last year, including schools in Marietta, Decatur, and Gainesville.[162] The Marietta schools stated that their goal in creating a charter school system was to improve high school graduation rates and to adopt "specific, rigorous" goals for grades one through eight.[163]

If more racially isolated minority schools face NCLB sanctions due to low performance on standardized tests, more of these schools will likely be converted into charter schools.

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[155] *Id.* at 142 (citing LA. REV. STAT. ANN. § 17:10.5 (2007)).

[156] *Id.* at 127 (citing LA. REV. STAT. ANN. § 17:10.5(A)(1)(d) (2007)).

[157] *Id.* at 127–28.

[158] *Id.* at 128.

[159] *Id.*

[160] GA. CODE ANN. § 20-2-2063.2 (Supp. 2008).

[161] GA. CODE ANN. § 20-2-2063.2(d) (Supp. 2008).

[162] News Release, Marietta City Sch., State School Board Approves District Charter System Status (June 12, 2008), *available at* http://www.marietta-city.k12.ga.us/newsroom/pressrelease/2008/ (follow "June 12, 2008" hyperlink; then follow "View Print Version" hyperlink).

[163] Marietta City Schools, Charter System Information, http://www.marietta-city.k12.ga.us/aboutus/charter.asp (last visited July 4, 2008).

V. CONCLUSION

Like most important Supreme Court cases, the real impact of *Parents Involved* will have to be assessed over time. It is likely that the case will prove to be an important moment for school districts throughout the United States. School districts now squarely confront the issue of whether there is a connection between student assignment plans and student academic performance. School districts that have racially isolated minority schools will be under particular pressure to figure out either how to improve student performance in these racially isolated schools, or how to end racial isolation in the schools. To the extent that *Parents Involved* gives school boards less choice about how best to improve its local schools, the case will be seen as a hindrance to the mission and policies of school districts.